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ROYAL COURT
(Samedi Division)

File No: 2018/241

4th June 2019

Before: **Sir Michael Birt, Commissioner with Jurats Crill and Ronge**

Between	**SWM Limited**	**Appellant**
And	**Jersey Financial Services Commission**	**Respondent**

Advocate O A Blakeley for the Appellant
Advocate D J Benest for the Respondent

JUDGMENT

COMMISSIONER:

1. This is an appeal by SWM Limited ("SWM") against a decision of the Respondent ("the Commission") dated 7th August 2018 to revoke SWM's registration as an investment business and to issue a public notice to that effect ("the Decision").

2. The appeal was heard over 3 days and we were provided with voluminous material comprising some 16 files. We have carefully considered all the material to which we were referred in the course of the written submissions and the hearing but, in the interests of brevity, we shall only refer in this judgment to such material as is necessary to explain our decision.

Preliminary matters

3. We think it convenient to outline certain matters of general application before turning to consider the factual background and the grounds of appeal.

(i) The statutory provisions

4. Pursuant to Articles 2 and 7 of the Financial Services (Jersey) Law 1998 ("the Law"), a person may not carry on business as an investment adviser in or from within Jersey unless registered. Article 9 confers the power to register upon the Commission and Article 9(3) sets out a number of grounds upon which registration may be refused. These include:-

> ***"(a) having regard to the information before the Commission as to the:-***
>
> ***(i) integrity, competence, financial standing, structure and organisation of the applicant,***
>
> ***(ii) …***
>
> ***(iii) …***
>
> ***the Commission is not satisfied that the applicant is a fit and proper person to be registered;***
>
> ***…***
>
> ***(f) the Commission has reason to believe that the applicant has at some time contravened a Code of Practice …"***

5. Article 9(4) deals with the revocation of a registration and provides (so far as relevant) as follows:-

> ***"(4) The Commission may revoke a registration under this Law at any time:-***
>
> ***..***
>
> ***(e) on one or more of the grounds set out in paragraph (3)(a), (b), (c), (d), (f) and (g), (where those sub-paragraphs are read as if references in them to the applicant were references to the registered person);***

(ea) if it appears to the Commission that it is in the best interests of any of the following persons that the registered person's registration be revoked:-

(i) persons who transacted or may transact financial service business… with the registered person …

(eb) if it appears to the Commission that, in order to protect the reputation and integrity of Jersey in financial and commercial matters, the registration should be revoked;

(ec) if it appears to the Commission that it is in the best economic interests of Jersey that the registration be revoked…"

6. Article 11 of the Law provides that where a person appeals against revocation, the revocation shall not take effect before the date on which the appeal is determined by the Court or withdrawn.

(ii) The approach of the Court on appeal

7. Article 11(3) of the Law provides that a person aggrieved by a revocation may appeal to the Court "*on the ground that the decision of the Commission was unreasonable having regard to all the circumstances of the case*".

8. The approach of the Court on hearing appeals under the Law was considered in depth at paras 75 – 82 of this Court's judgment in Francis –v- Jersey Financial Services Commission [2017] JRC 203A. We adopt and apply the principles there described. In short, the Court may not allow an appeal simply because it has reached a different view of the matter from that of the Commission. It has to go beyond that and find the decision to be unreasonable, in the sense of being beyond the bounds of reasonable justification.

(iii) The Commission

9. The Court described the Commission and the decision making process which it follows when deciding, for example, to revoke a registration at paras 25 – 32 in Francis and for convenience we incorporate those paragraphs in this judgment:-

"25. Although the Commission is one body in law, it divides itself into two parts for many purposes. The Board of Commissioners ("the Board") consists of the Commissioners appointed by the States (including the Director General who is also a member of the Executive). They have ultimate responsibility for the affairs of the Commission. All other officers and employees of the Commission are referred to as the Executive. They are responsible for the day to day authorisation and supervision of regulated financial services business and for exercising the role within delegated authority from the Board. The Executive will refer matters to the Board for determination where the relevant powers that might be exercised are retained by the Board or where the Executive otherwise considers that the matter under consideration requires consideration by the Board.

26. When considering whether to exercise its statutory powers of sanction against any person, the Commission follows its published Decision Making Process ("DMP") which is outlined in its published guidance note entitled 'Decision Making Process", the revised edition of which was issued on 5th August 2011.

27. Prior to embarking upon a DMP the Executive will have carried out such investigations as are necessary and held a Preliminary Review to decide whether to initiate a DMP or whether the matter can be dealt with in some other manner. If the DMP is initiated, there are four stages:-

Stage 1 – Disclosure and Verification of Information.

Stage 2 – Review Committee

Stage 3 – First Meeting of the Board

Stage 4 – Second Meeting of the Board.

28. The guidance note explains in some detail what is involved at each stage. Stage 1 involves disclosure to the subject of the information which will be the basis of the decision to be taken by the Commission. The guidance note states the objective of this process as being to ensure that the subject is provided with all the information on which the Commission will rely in making its decision and to have that information examined as being reliable and complete. The subject is therefore requested to respond to the Executive with any comments, corrections or additions which he may

wish to make. The guidance note states at paragraph 7.3 that, in determining the date by which the response should be provided, the Executive will take account of the nature and volume of information and the extent to which individual items have been previously available to the subject for review and comment. Following consideration of the comments, the document package, amended as necessary in the light of the comments received, is presented to a Review Committee as Stage 2. At the same time the subject is provided with a copy of any new and revised information from that previously provided.

29. Stage 2 involves consideration of the matter by the Review Committee. This is convened on a case by case basis and consists of members of the Executive. The Director General may well chair the Review Committee and it will also usually be attended by the Director, Enforcement and the Director of the relevant sector (e.g. banking, trust company business, etc.) together with one other Director or Deputy Director not directly connected with the case. The Review Committee considers whether further investigations should take place or whether the matter should be discontinued or whether it should be referred to the Board. A written record of the decision is kept and is provided to the subject.

30. Stage 3 consists of the first meeting of the Board if the Review Committee has decided to refer it to the Board. After considering the documents presented by the Review Committee, the Board may request further information or decide that it is 'minded-to' take the recommended action or some other action. If the Board is 'minded-to' exercise any one or more of its powers, the subject is notified in writing to that effect and provided with a copy of the documents supplied to the Board, including the memorandum prepared by the Executive in order to present the matter to the Board. It is intended therefore that the subject should have all the information placed by the Executive before the Board.

31. The notification to the subject states the date on which the second meeting of the Board will be held and offers the subject an opportunity to make written submissions to the Board within a specified time frame and to attend the second meeting of the Board to make oral submissions. Where written submission is made by the subject, the Executive may prepare comments on that submission. The comments of the Executive will be submitted to the Board and disclosed to the subject prior to the second meeting of the Board.

32. Stage 4 consists of the second meeting of the Board. Prior to that meeting the Board and the subject will be provided with any information or documents that have been added to the package since the first Board meeting, any written submissions made by the subject and any comments of the Executive. At that meeting the subject may make oral submissions and be questioned by the Board. At the conclusion of the hearing the subject, the Executive (including the Director General) and all other persons who are not Commissioners or the Commission's Secretary leave the meeting. The Board then considers the matter and either reaches a decision or delays it. The guidance note makes it clear that it is for the Board to decide which of the matters it accepts and which it does not. The guidance note goes on to say that once a decision has been reached to exercise any statutory powers, the Board will give notification of its decision and will include the reasons for the decision and particulars of any right of appeal."

10. Where it is helpful to refer to the Board or the Executive we shall do so but where it is not so necessary, we shall refer simply to the Commission.

The factual background

11. SWM is a registered investment business having first been registered in 1999, albeit then under a different name. Its primary business is the provision of financial advice relating to savings and investments, and retirement planning services. All five of SWM's investment business employees were at the material time its executive directors, who were also shareholders in the company.

12. As part of an industry-wide initiative, SWM (together with many others) was asked in January 2014 to complete a thematic questionnaire on the topic of suitability of investments. It was in the light of SWM's response to this questionnaire that the Commission first became concerned, specifically in relation to the advice given by SWM to some 42 clients between 2004 and 2009 in respect of two alternative investment funds. The funds in question were the Protected Asset TEP Fund ("PATF") and the Matrix Asset Based Fund 2 ("Matrix").

13. PATF is an unregulated open-ended investment company incorporated in the Isle of Man and investing in traded endowment policies. Matrix is an unregulated sub-fund of Matrix Alternative Investment Strategies Fund Limited, a Bermuda mutual fund company. It is identified as a 'geared hedge fund' which invests in funds of asset backed securities. Matrix suspended redemptions in March 2009 and there is now no realistic prospect of it having any future value.

14. During the course of the Commission's enquiries, it also became concerned about other investment advice given by SWM to 9 Jersey residents in 2014/2015 in relation to unregulated loan notes. The loan notes ("CGLN") were issued by unregulated special purpose vehicles (established by the Cherry Godfrey Group) which invested in unregulated fixed term retail consumption loans. We shall refer to Matrix, PATF and CGLN together as "the Products".

15. On 9th January 2015, the Commission issued a direction to SWM requiring SWM to appoint Grant Thornton as an independent reporting professional to conduct a review of SWM's client advice activities in relation to Matrix and PATF, to write to the clients who were to be the subject of the review, and to comply with certain safeguarding measures including not to make any payments other than in the ordinary course of business. The choice of Grant Thornton was not supported by SWM who considered that, as a firm of accountants, Grant Thornton did not have the necessary expertise to opine on the quality of SWM's investment advice. The Commission however disagreed.

16. After providing a draft of its report to SWM and receiving SWM's response, Grant Thornton finalised its report on 29th June 2015 ("the GT report"). It had examined the files of 8 clients who had invested in PATF and/or Matrix and concluded that SWM's flawed assessment of PATF and Matrix as low risk meant that all 8 clients received investment recommendations that were inconsistent with their needs and objectives. The advice was accordingly unsuitable. Grant Thornton also identified various weaknesses in the process used by SWM to assess the clients' attitude or tolerance to investment risk prior to making a recommendation to invest in PATF or Matrix. These were detailed in the report.

17. The GT report also referred to a complaint by one of the clients, Mr Perchard, in May 2013 about his investment in Matrix. SWM said that that complaint had been investigated in accordance with its complaints procedure and had been dismissed. However, Grant Thornton raised concerns about the investigation of the complaint as there was little or no documentary evidence about what had occurred during the investigation of the complaint. There was no written report or record of review by the person investigating the complaint and no record of any discussion by the investigator with the person within SWM who had given the advice to Mr Perchard. Because SWM was unable to provide sufficient evidence it had complied with its own complaints handling policy, Grant Thornton recommended that the complaint should be re-opened.

18. SWM rejected the conclusions of Grant Thornton as to the risk level of an investment in PATF and/or Matrix and also refused to re-open the investigation into the Perchard complaint.

19. The Commission conducted an 'on-site' examination of SWM in August 2015 and subsequently indicated that it was minded to commence a DMP in order to determine whether it was appropriate to revoke SWM's registration (although in fact the DMP did not commence until February 2017). At this stage SWM sought the Commission's consent to employ Comsure (a regulatory consultant) to advise SWM in relation to the findings of the on-site examination and to appoint an independent person to provide a second opinion on the findings of the GT report. The Commission refused consent on the basis that this was not a payment in the ordinary course of business.

20. On 22nd October 2015, the Commission issued a notice requiring SWM to provide information and documents regarding CGLN, which it did. The Commission issued a further notice requiring SWM to write to all 42 clients who had received "*unsuitable advice*" (according to the GT report) in respect of Matrix and PATF and to refrain from recommending investment in CGLN without the Commission's prior consent. Prior to this, on 16th October 2015, the Commission had written to SWM and said "*SWM having mis-sold investments to clients should now make restitution of any losses suffered by those investors.*"

21. SWM subsequently appealed to the Court both against the refusal to agree to the obtaining of a second opinion and against the direction that it write to its clients. Both appeals were successful. In relation to the first, the Court held at [2016] (1) JLR 65 that payment for obtaining advice was in the ordinary course of business. In relation to the second, the Court agreed at [2016] JRC 094 to stay the direction. In particular, it expressed sympathy with the submission of SWM that, no doubt by reference to matters such as the comment quoted in the preceding paragraph, the Commission appeared already to have made up its mind that there had been mis-selling (see para 19 of the judgment).

22. On 12th January 2016 the Commission issued its on-site examination report ("the On-Site Report") which included 14 'high risk' findings, including in relation to the selling of CGLN. SWM responded to the On-Site Report by letter dated 12th February 2016 which enclosed a PEMS (Post Examination Monitoring Schedule) spreadsheet together with supporting documents ("the PEMS response") and we shall refer to that in greater detail later in this judgment.

23. On 27th January 2016, Duff and Phelps were appointed to perform an assessment of the GT report and to conduct a review of a further selection of clients who had invested in PATF and/or Matrix but had not been the subject of the GT report. That report (the DP report) was provided in draft to SWM and following their comments, was finalised on 26th September 2016. It concluded that the findings and conclusions of the GT report were reasonable and that the further 9 clients whose files Duff and Phelps had reviewed had similarly received unsuitable advice from SWM.

24. On 17th October 2016, SWM provided the Commission with the report of Mr Goodyer (which had been prepared in June 2016). Mr Goodyer had considered the risk rating of PATF and concluded that he would place it in the low/medium risk category for 2004 to 2007 and in the medium risk post December 2007. As to the question of the due diligence undertaken by SWM he said that he was less able to be certain in his opinion due to the lack of supporting documentary evidence but said that, on the basis of the answers received to his questions as to the frequency of, number of attendees at and the aspects covered at numerous meetings which took place between SWM and the promoters of PATF, he was sufficiently satisfied that reasonable levels of due diligence were carried out. This appears to have been confined to due diligence in respect of ascertaining the risk level of PATF, not due diligence in respect of client requirements.

25. The Executive's Investigation Report ("the Investigation Report") was finalised on 18th July 2017. It was supplied to SWM which provided its response on 8th September 2017.

The DMP

26. Stage 1 of the DMP had commenced on 27th February 2017 and involved the production of the Investigation Report. Stage 2 was commenced on 30th August 2017 when a memorandum was sent to the Review Committee. It recommended that the case be referred to the Board for revocation of SWM's registration. It is clear from the memorandum and from what the Executive said at the Review Committee meeting on 29th November 2017 that the key concern of the Executive was that, despite as they saw it compelling evidence of unsuitable advice to clients, SWM had failed to recognise any such failings. The Review Committee agreed with the Executive and the minutes of its meeting described the position as follows:-

> ***"Whilst noting that SWM disagrees with the position of the JFSC in relation to the PATF and Matrix products, the Committee preferred the evidence that unsuitable advice had been given to various clients. The fact that SWM had failed to acknowledge that unsuitable advice had been given indicated a lack of competence (in failing to recognise what was unsuitable advice) and/or a lack of integrity (in being aware that unsuitable advice had been given but continuing to deny that it had been given, or being potentially reckless as to suitability). The Review Committee considered this led to the conclusion of there being an unacceptable level of risk to SWM's current and future clients. The Review Committee was therefore satisfied that the revocation of SWM's licence should be referred to the Board."***

27. The meeting of the Board (comprising Stage 3) took place on 8th February 2018. However at that stage the Board decided to seek further information from the Executive and SWM on a number of

matters and the meeting was not resumed until 8th March 2018. On that occasion, the Board decided that it was minded to revoke SWM's registration and that a document should be produced setting out the matters which caused the Board to be so minded. There would then follow a Stage 4 meeting in accordance with the DMP.

28. On 2nd May 2018, the Board wrote to SWM enclosing the 'minded to' letter ("MTL") together with other documents including a draft public statement. The MTL was a very detailed document comprising, with its appendices, some 47 pages. It set out the relevant facts as understood by the Board together with the conclusions which the Board was minded to draw from those facts and the provisions of the Investment Business Code of Practice ("IB Code") which the Board considered had been breached. It listed the matters of concern under four main headings, namely inadequate processes for advising clients and product due diligence, failure to handle complaints properly, failure to maintain adequate insurance and receiving prohibited third party payments. The letter of 2nd May set out the arrangements for the Stage 4 meeting and invited any written representations prior to that time.

29. The Stage 4 meeting of the Board was held on 9th July 2018. Somewhat surprisingly, SWM had not made any written representations in relation to the MTL but it was represented at the meeting by its directors and by Advocate Blakeley. The Court has had an opportunity of reading the minutes and the transcript of the meeting. Having heard from Advocate Blakeley and from the Executive the Board reconvened on 10th July. It reached a conclusion which was communicated to SWM on 8th August 2018. That enclosed the formal Notice of Revocation ("the Notice"), the key paragraphs of which are in the following terms:-

> ***"4.2 Following the review and careful consideration of the submissions, comments and information provided on behalf of SWM, and on behalf of the Executive, the Board has concluded:-***
>
> ***4.2.1 That, with regard to the integrity and competence of SWM, it is not satisfied that SWM is a fit and proper person to be registered. The Board considers this to be the case for the following reasons:-***
>
> ***(a) SWM displayed a lack of competence through its failure to maintain and follow appropriate written procedures in relation to its approval of the Products, completion of client risk profiles, assessment of client investment experience, and completion of due diligence on the Products. This is demonstrated by SWM's failure to maintain adequate contemporaneous records in several areas, including***

records of why its investment recommendation to a client was suitable, and records of the due diligence it carried out on the Products.

(b) SWM's failure to maintain adequate PII cover or understand its obligations with respect to making notifications to its insurers and the JFSC further demonstrates its lack of competence.

(c) SWM demonstrated a lack of integrity in the context of client complaints handling by refusing to re-open a client complaint when advised to do so by Grant Thornton, when Grant Thornton had concerns regarding the robustness of SWM's investigation of the complaint (see paragraph 7.2.4 of the MTL, included at Appendix A). This was also demonstrated by SWM when it applied, what was reasonably interpreted by a client as undue pressure to dissuade the client from bringing a complaint against SWM (see paragraph 7.2.6 of the MTL).

(d) A further example of SWM demonstrating a lack of integrity is its acceptance of prohibited payments from third parties, as it received remuneration by way of commission in relation to the CGLN (see paragraph 9.2.4 of the MTL).

4.2.2 That SWM, on numerous occasions and in numerous regards, contravened the Investment Business Code of Practice (IB Code). This is demonstrated by the significant and continuing breaches of the IB Code rules detailed in the following sections of the MTL:-

(a) Section 6.3, which provides details of the breaches relating to SWM's inadequate processes for advising clients and carrying out product due diligence,

(b) Section 7.3, which provides details of the breaches resulting from SWM's failure to handle client complaints properly,

(c) Section 8.3, which provides details of SWM's breaches on the basis of its failure to maintain adequate PII, and

(d) Section 9.3, which provides details of the breaches SWM committed by receiving prohibited payments from third parties.

4.2.3 …

4.2.4 …

4.3 The Board's preliminary view expressed in the MTL has not altered following the submissions, comments and information given by SWM and the Executive at the Stage 4 Meeting. As a result, the reasons provided in the MTL remain valid (see the MTL at Appendix A). In particular, having taken into account the statutory powers available to the JFSC, the Board considers that revocation of SWM's registration is an appropriate and proportionate measure for the following reasons:-

4.3.1 Given that the Product sales occur between 2004 and 2015 and were carried out by the same staff as are operating within SWM presently, the period during which ends SWM's breaches of the IB Code occurred is significant;

4.3.2 Given the representations of SWM referred to in paragraph 2.6.1, which the Board considers demonstrate SWM's continuing and serious failure to understand the requirements upon it as a registered investment business (since the first three matters must be determined wholly independently, and in advance, of considering what, if any, product should be recommended to a client, and the risk characteristics of that product);

4.3.3 Given the amounts invested by SWM's clients in the Products relative to their wealth, the loss that has been suffered by some clients is significant; and

4.3.4 Given SWM's refusal to acknowledge or take steps to remedy any of the significant failings or rule breaches as outlined above, the Board considers that the IB Code breaches are ongoing and SWM therefore continues to pose a risk to the best interests of Jersey retail financial service clients."

This appeal

30. SWM filed lengthy written grounds of appeal but in his written and oral submissions, Advocate Blakeley helpfully grouped these together under a number of headings. We shall do likewise.

1. Due Diligence Procedures

31. The conclusion of the Board on this aspect is set out at sub-paragraph (a) of para 4.2.1 of the Notice which is quoted at para 29 above.

32. There was no dispute before us that due diligence by an investment adviser, who is considering recommending that a client invest in a particular investment, requires the adviser to consider, amongst other matters, the risk rating of the proposed investment which then has to be measured in terms of suitability to the requirements of the client in relation to matters such as the client's liquidity needs, attitude to investment risk, investment objectives and experience, capacity for loss and concentration of risk i.e. the proportion of money to be invested in the proposed investment in relation to the client's total wealth available for investment. Only having considered these and any other relevant matters, is an investment adviser in a position to decide whether to recommend a particular investment to the client and if so, the level of investment. We shall use the term "due diligence" to cover all these matters unless it is limited in the particular context.

33. It was the view of the Executive (as evidenced in the Investigation Report and the decision of the Review Committee) that, as indicated by the GT and DP reports, SWM had not exercised due diligence in relation to the Products and had given unsuitable advice to the clients who invested (i.e. they had not in fact carried out satisfactory due diligence). This was hotly contested by SWM who disagreed with the risk rating attributed to each of the Products and also said that it had undertaken due diligence, albeit some of it was done orally.

34. As can be seen, the decision of the Board was very different from that recommended by the Executive. The Board made no finding of mis-selling (by which we mean giving unsuitable advice as a result of a lack of satisfactory due diligence). It confined its conclusion to the fact that there were no appropriate written procedures in relation to due diligence and this was demonstrated by the fact that there were no adequate contemporaneous records as to the due diligence carried out in relation to the Products. We shall refer for convenience to the Board's finding at sub-paragraph (a) of para 4.2.1 of the Notice as 'inadequate documentary due diligence'.

35. In the affidavit sworn for these proceedings by one of the directors of SWM ("the SWM affidavit"), it is stated that, because the Notice at para 3.1.2 stated that the Board had not rejected the oral evidence of the directors that they had in fact carried out due diligence, SWM considered that the

Board accepted that due diligence had been carried out and the criticism was therefore simply that this had not been documented.

36. In his second affidavit, Lord Eatwell confirmed this was not the case. Whilst it was correct that the Board had not rejected the oral testimony of the directors, neither had it felt able to accept that testimony. This was because of the lack of documentary evidence to show that due diligence had taken place, which explained why the Commission required regulated entities to comply with the requirements for keeping written records so that the Commission could effectively carry out its regulatory function. In our judgment, the fact that this is the Board's decision appears quite clearly from the Notice.

37. At the end of the day, Advocate Blakeley's submission on this ground of appeal was narrowly focused. He said the Board was in effect preferring the evidence of one set of experts (Grant Thornton and Duff and Phelps) to another (Mr Godel). Where that was the case the Board had to give reasons to explain why it had preferred the evidence of one expert to another. He drew support for this proposition from an extract from De Smith's Judicial Review 7th Edition at para 7 – 102 on page 455 which was referred to by the Master in W –v- Jersey Financial Services Commission [2016] JRC 231A at para 42. The extract from De Smith reads:-

> ***"The reasons must generally state the decision-maker's material findings of fact (and, if the facts were disputed at the hearing, their evidential support), and meet the substance of the principal arguments that the decision-maker was required to consider. If a decision is made on the basis of the evidence of witnesses or experts, reasons for preferring one witness or expert over another should generally be explained."***

38. However the Court has considered this topic in the case of Anchor Trust Limited –v- JFSC [2005] JLR 428 at para 113:-

> ***"Mr. Scholefield submits that the letter of reasons explains how the Board has reached its decision but not why. He argues that it is silent as to why the Board preferred the views of the Executive and the inspector to those of Anchor. In our judgment, this submission requires too much. The Board is not sitting as a judge to give a reasoned judgment. We consider that the reasons set out in the Board's letter fulfil the requirements imposed by art. 11(2) and those of fairness. Anyone reading that letter can understand exactly why Anchor has been refused registration. The Board states the findings of fact which it has made and explains the material upon which it has reached those findings (e.g. which passage in the inspector's report). It then goes***

on to relate those findings of fact to the criteria for refusal specified in art. 9(3) of the 1998 Law. We do not think that an administrative body such as the Commission is under a duty to descend into the level of detail suggested by Mr. Scholefield and explain in relation to each finding of fact exactly why it has chosen the view of the Executive or the inspector rather than that of Anchor. As we say, one must stand back, look at the letter and ask whether the recipient of the letter would know why the Board refused the application. In our judgment, the letter explains why very clearly."

While the Anchor decision was appealed (unsuccessfully), para 113 does not appear to have been the subject of any criticism in the Court of Appeal.

39. In our judgment, there was no obligation on the Board to explain why it preferred the evidence of one expert to another provided the reasons for its decision emerge with sufficient clarity for the person concerned to know why the Board has reached the decision which it has and therefore whether he may have grounds to appeal that decision.

40. In our judgment, the reasons for the Board's decision on the topic of inadequate documentary due diligence are entirely clear. The MTL is a very detailed document and sets out over nearly 6 pages in section 6.2 the relevant facts which the Board relies upon for its conclusion in relation to the inadequacy of SWM's due diligence documentation. There was ample material to support those findings. Not only were there the GT report and the DP report but, most importantly, there was also the On-Site Report by the Executive. This found numerous defects in the due diligence documentation of SWM. The Board was not therefore relying simply on the GT report and the DP report.

41. Furthermore, as stated earlier, the Goodyer report (prepared by an expert instructed by SWM), when considering the evidence of due diligence by SWM in relation to PATF as an investment said this at para 4.17:-

"Moving on to the matter of due diligence, I am less able to be certain in my opinion due to lack of supporting documentary evidence. However, on the basis of the answers received to my questions as to the frequency of, number of attendees at and the aspects covered at numerous meetings that took place between … SWM, I am sufficiently satisfied that reasonable levels of due diligence were carried out."

42. SWM relied upon the report of Mr Godel. Mr Godel was instructed by SWM to prepare a written opinion in relation to proceedings brought by Mrs Smith against SWM concerning her investment

in PATF. Mr Godel had previously been a senior officer in the Commission. He appears only to have examined Mrs Smith's client file as well as the documents concerning PATF and certain other documents listed in his report. Mrs Smith's file contained a 'Reasons Why' letter setting out SWM's view of the risk rating of PATF and its suitability for Mrs Smith, although this appears to have been sent to her six weeks or so after the investment was made. Be that as it may, SWM are entitled to point to the fact that Mr Godel expressed the opinion that the documentation on Mrs Smith's client file was sufficient to demonstrate compliance with the requirements of the IB Code of March 2001 which was in force at the time. However, he did not opine on due diligence for any other client.

43. In our judgment, given these various pieces of evidence, there was ample material upon which the Board could properly reach the conclusion which it did in relation to the due diligence documentation and we cannot possibly categorise its finding at sub-paragraph (a) of para 4.2.1 of the Notice as unreasonable.

44. We should add that Advocate Blakeley also made a point concerning the losses of investors under this heading but we think that is more conveniently considered in relation to the matter of sanction, which we discuss below.

2. Receiving prohibited third-party payments

45. Advocate Blakeley turned next to the Board's finding of a lack of integrity by reference to receipt of prohibited payments from a third party. For convenience, we repeat the relevant finding at sub-paragraph (d) of para 4.2.1 which is in the following terms:-

> ***"A further example of SWM demonstrating a lack of integrity is its acceptance of prohibited payments from third parties, as it received remuneration by way of commission in relation to the CGLN (see paragraph 9.2.4 of the MTL)."***

46. The relevant facts as found by the Board are set out at para 9.2 of the MTL. The payments were made by Cherry Godfrey who were the promoters of CGLN. The agreement reached between Cherry Godfrey and SWM was that Cherry Godfrey would pay £200 to SWM in respect of every client Cherry Godfrey introduced to SWM for the purposes of SWM undertaking a financial review and subsequently providing investment advice to that client. The £200 would be paid irrespective of whether or not SWM advised the client to invest in CGLN or whether the client actually invested in CGLN. The sum was intended as a contribution towards the costs of SWM's financial review of the client's needs etc. in order to decide whether to recommend that the client invest in CGLN. The payment was disclosed in the Suitability Reports to clients who were advised to invest in CGLN.

The arrangement also contemplated a fee of £200 for each client that SWM introduced to Cherry Godfrey (i.e. not a client that had been referred initially by Cherry Godfrey) but there does not appear to have been any payments of the fee to SWM on the basis of an introduction by SWM to Cherry Godfrey. Cherry Godfrey referred 10 clients to SWM. Of these, 9 were advised by SWM to invest in CGLN following its financial review and one was not.

47. Rule 4.8 (previously 4.7) of the IB Code provides that a registered person carrying on class C or class D investment business is not permitted to receive remuneration by way of commission from product providers for investment advice services provided to retail clients unless one of the specific exceptions applies (which were not relevant in this case). 'Commission' is not defined in the IB Code but the MTL asserted that its ordinary meaning was a payment which involved the giving of a benefit or inducement. Although SWM and Cherry Godfrey characterised the payment as a contribution towards the cost of SWM's reviews of clients who were introduced to SWM by Cherry Godfrey, the Board concluded that this did not change the fact that it was the payment of commission. The payment reduced SWM's operating costs and increased profits, thereby conferring a benefit on SWM.

48. Advocate Blakeley made two key submissions on this part of the Board's decision:-

(i) It was not reasonable for the Board to conclude that these payments amounted to commission (and therefore a breach of the IB Code) and its reasons for so concluding were unsatisfactory.

(ii) Even if it was commission, in the particular circumstances of this case, the payment did not disclose a lack of integrity by SWM and a finding that it did was unreasonable.

49. One of the Jurats accepts the first of these submissions. She agrees that payment of a fee regardless of whether there is any recommendation to invest in CGLN cannot be said to amount to an inducement for SWM to recommend investment in CGLN and accordingly it does not give rise to the conflict of interest concern which lies behind the rule against the payment of commission in the IB Code. Furthermore, in the absence of any definition, she considers that 'commission' should bear its normal meaning. She does not consider that a payment which is not dependent on a recommendation to invest and which is intended to cover the time and expense of carrying out a financial review amounts to a commission within the ordinary meaning of the word. Moreover, she does not find the reasoning of the Board to be satisfactory when it concludes that a payment amounts to a commission because it reduces SWM's operating costs and increases its profits thereby conferring a benefit upon it. Payment of any fee for services provided to a customer would have the same effect, but a fee for genuine services provided would not normally amount to a commission.

50. The other Jurat agrees with the Board's view that the payments amounted to commission on the basis that, even though payment would be made regardless of whether SWM subsequently advised a client to invest in CGLN, there was nevertheless an inducement on SWM to do so in the context of developing a relationship with Cherry Godfrey in the expectation that, if it advised clients to invest in CGLN, there would be further referrals and payment of further fees by Cherry Godfrey, whereas if it did not recommend investment in CGLN, it was likely that Cherry Godfrey would in due course look elsewhere for an adviser to whom it would refer potential clients.

51. However both Jurats are agreed that, in an area such as this, it is very much a matter for the Commission as regulator to determine within reason what does or does not amount to a commission and its decision that the payments in this case did amount to commission cannot be categorised as unreasonable. Having said that, the Court is of the view that the investment profession might well benefit from further guidance to be issued by the Commission.

52. The decision that it was not unreasonable for the Commission to determine these payments amounted to commission leads to Advocate Blakeley's second submission, namely whether this justifies a finding of lack of integrity on the part of SWM.

53. In Francis, the Court indicated at para 343 that it found helpful the quotation from a decision of the Upper Tribunal in the UK in the case of First Financial Advisers Limited –v- FSA (21 June 2012) to the effect that "*Even though a person might not have been dishonest, if they lack either an ethical compass or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity*." The Court recommended that the Commission should issue and publish a guidance note making clear that a finding of lack of integrity was not the same as a finding of dishonesty and expanding on what it did mean.

54. The Commission has since issued a guidance note dated 19th July 2018 which contained such guidance and in particular adopted the view of the Court in Francis as just described. The guidance was therefore in force at the time of the Decision in this case but of course was not available at the time the payments by Cherry Godfrey were made in 2014 and 2015. Interestingly, since the decision in Francis, the English Court of Appeal, in the case of Solicitors Regulation Authority –v- Wingate [2018] 1 WLR 3969, has ruled that lack of integrity is not the same as dishonesty. Although dishonesty necessarily involves a lack of integrity, one can have a lack of integrity without there being any dishonesty.

55. As just stated, one Jurat agrees with SWM in its view that the payments in this case do not amount to commission. The other Jurat, whilst being of a contrary view, certainly accepts that the view of the other Jurat and of SWM is a perfectly tenable one. The Court is therefore unanimous in being

of the view that it is simply a question of a difference of opinion as to whether the payments in this case are properly classed as commission or not. In the circumstances, it is in our judgment quite wrong to categorise the opinion of SWM as demonstrating a lack of integrity. In the particular circumstances of this case, the view of SWM that these payments did not amount to commission for the purposes of the IB Code does not suggest a lack of an ethical compass or one which is to a material extent pointing in the wrong direction. We hold therefore that the finding of the Board contained at sub-paragraph (d) of para 4.2.1, namely that receipt of the payments demonstrates a lack of integrity, is unreasonable. For the avoidance of doubt, we make clear that this finding is specific to the unusual facts of this case. If an investment adviser were to receive a fee for introducing a client to an investment product in circumstances where it obviously amounted to a commission, an unreasonable belief on the part of that investment adviser that the payment did not amount to commission could indeed point to a malfunctioning ethical compass such that it could amount to a lack of integrity.

3. Failure to handle complaints properly

56. The relevant finding of the Board in this connection is at sub-paragraph (c) of para 4.1.2 of the Notice which is in the following terms:-

> ***"SWM demonstrated a lack of integrity in the context of client complaints handling by refusing to re-open a client complaint when advised to do so by Grant Thornton, when Grant Thornton had concerns regarding the robustness of SWM's investigation of the complaint (see paragraph 7.2.4 of the MTL, included at Appendix A). This was also demonstrated by SWM when it applied, what was reasonably interpreted by a client as undue pressure to dissuade the client from bringing a complaint against SWM (see paragraph 7.2.6 of the MTL)."***

57. The facts found by the Board in this connection are set out over some 4 pages in Section 7 of the MTL.

(i) The Perchard complaint

58. The first matter relates to the Perchard complaint which we have already outlined when setting out the factual background. The GT report concluded that SWM had failed to produce any contemporaneous evidence to show that it had properly investigated Mr Perchard's complaint about the advice to invest in Matrix. In particular he complained that the '*high risk element of investing in this fund was not disclosed clearly and was misrepresented.*' The GT report recommended that Mr

Perchard's complaint should be re-opened due to concerns regarding the robustness of SWM's investigation and the lack of available evidence as to the steps taken to investigate the complaint. SWM has refused to do so on the basis that it did not consider it to be necessary and would not benefit anyone. An additional reason given by SWM for not re-opening the investigation is that the Commission has refused disclosure of its file in relation to the Perchard complaint.

59. Advocate Blakeley submitted that the refusal to disclose its file in relation to the Perchard complaint was unfair and unacceptable behaviour by the Commission which explained SWM's refusal to re-open investigation of the complaint. There might well be material in the Commission's files which showed it was happy with the way the Perchard complaint was investigated at the time or other material which would be relevant to the decision as to whether to re-open the investigation of the complaint.

60. Despite our best efforts, we are unable to follow this point. The recommendation in the GT report was very straightforward. Because of the lack of appropriate evidence as to how SWM had dealt with the complaint, it recommended that the investigation of the complaint be re-opened. It was a very simple request and we cannot see any reason why it should not have been complied with and why SWM needs to see the files of the Commission which relate to the complaint. All the information to determine whether the complaint is well-founded will be available in SWM's files, as it was SWM which dealt with Mr Perchard at the time of the investment. SWM does not need anything else to decide whether the complaint is justified and whether it was properly dealt with on the first occasion.

61. We should add that, as a precaution, the Commission has subsequently asked its lawyers to look at its file in order to see whether there is anything there which might undermine the Commission's case in this respect and has been advised that there is nothing.

62. The question therefore is whether it is appropriate to categorise SWM's refusal to re-open the complaint as showing a lack of integrity. In the Court's opinion, such conduct might more naturally be categorised as 'obstinate' or 'unjustified' conduct rather than conduct which shows a lack of integrity. However the test is not what the Court considers to be the position but rather whether the Board's decision is unreasonable. Does the refusal in this particular case suggest a malfunctioning ethical compass? On balance the Court has concluded it is not unreasonable on the part of the Commission to have concluded that the refusal to re-open the complaint just crosses the line into a lack of integrity.

(ii) The Smith complaint

63. The facts as found by the Board are set out in the MTL at para 7.2.5. Mrs Smith wrote to SWM on 29th February 2016 regarding her investment in PATF, which had declined in value. The next day Mr Le Fondré, the director of SWM who had advised Mrs Smith in connection with the investment, telephoned and spoke to Mr Smith, who was clearly not expecting the call. The stated purpose of the call was to determine whether or not the letter from Mrs Smith was a complaint against SWM. Tracey Freeman, who was the acting Compliance Officer of SWM, sat in on the telephone call. During the call Mr Le Fondré advised Mr Smith that if Mrs Smith pursued the complaint against SWM, SWM would no longer be able to act as her financial adviser.

64. The MTL went on to say at para 7.2.6:-

> ***"It is not acceptable for a firm to state that it will cease advising a client who has brought a complaint against a firm unless they drop the complaint. It is also not acceptable for a firm to state this in circumstances where it would reasonably be understood by the client to be an ultimatum or pressure tactic used to dissuade them from bringing a complaint."***

65. This was reflected in the Notice when, as quoted above, the Board said at sub-paragraph (c):-

> ***"This*** **[a lack of integrity]** ***was also demonstrated by SWM when it applied, what was reasonably interpreted by a client, as undue pressure to dissuade the client from bringing a complaint against SWM."***

66. In his second affidavit, Lord Eatwell confirmed this meant what it said and that accordingly there was no finding by the Board that Mr Le Fondré intended to apply undue pressure.

67. In his written submissions, Advocate Blakeley stated that SWM disagreed with the Board's conclusion that undue pressure was put upon the client during the telephone call. In our judgment, this is a wholly untenable view on the part of SWM. We have been shown the transcript of the call. It is perfectly plain that Mr Le Fondré is making it quite clear to Mr Smith that proceeding with the complaint would mean that SWM could no longer act as their adviser but that if the complaint was dropped, SWM could continue. For example, to quote only one remark by Mr Smith to show that he fully understood this "*Yeah, yeah. And the only way I can stay with you then, really, is to withdraw the claim?*"

68. In his oral submissions, Advocate Blakeley did not maintain this position on behalf of SWM. He accepted it was reasonable for the Board to find that the words used by Mr Le Fondré during the

call amounted to undue pressure to withdraw the claim and that it was reasonably understood in this way by Mr Smith. He submitted however that, in the absence of an intention on the part of SWM to apply undue pressure, there could be no lack of integrity, merely a question of competence.

69. We disagree. The words spoken by Mr Le Fondré – and the position was aggravated by the fact that the acting Compliance Officer was listening in but did not intervene to correct anything said by Mr Le Fondré –could only be taken as applying pressure to withdraw the complaint if the client wished SWM to continue to act as investment adviser. The words could have no other meaning. Where words used are so clearly improper then, even in the absence of an intention on the part of Mr Le Fondré to apply undue pressure, a failure to realise the effect of the words which he was using can properly be regarded as suggesting there has been a malfunction of his ethical compass (and that of the Compliance Officer) and can reasonably be taken as amounting to a lack of integrity. It follows that we do not find the Board's decision in this respect to have been unreasonable.

4. Insurance

70. The decision of the Board on this aspect is contained at sub-paragraph (b) of para 4.2.1 of the Notice and is in the following terms:-

> ***"SWM's failure to maintain adequate PII cover or understand its obligations with respect to making notifications to its insurers and the JFSC further demonstrates its lack of competence."***

71. The relevant facts and the basis for concluding that these displayed a lack of competence on the part of SWM are set out in some detail over 6 pages in Section 8 of the MTL. We were also taken to some of the contemporaneous emails during the course of the hearing.

72. Before summarising the facts, it is however important to note a particular aspect of PII policies and this is that they are written on a 'claims made' basis. In other words, it is the policy in force when the claim is made which is the relevant policy, not the policy which was in force at the time of the alleged professional negligence. This can have unfortunate consequences as we shall see. However, if the insured person notifies the insurers of circumstances which may give rise to a claim under the policy, subsequent claims arising out of those circumstances will be covered by that policy rather than by a later policy which may be in force at the time the claim is actually made.

73. With that introduction, we consider first the position in relation to Matrix. Claims in respect of Matrix were included in the 2012/13 policy of SWM. Prior to the renewal of the policy in October 2013,

SWM was engaged in discussions with its broker ("EIB") regarding notification of potential claims in respect of Matrix. In the renewal proposal form, SWM had responded "no" to the standard question in the form asking whether there were any circumstances which might give rise to a claim or potential claim. This was despite the fact that Matrix was by then valueless and Mr Perchard's complaint regarding his investment in Matrix had been made to SWM in May 2013. EIB queried this response and pointed out that it would be safer to notify insurers of the investments in Matrix (and certain other funds) as a 'claim circumstance' (i.e. a circumstance which might give rise to a claim under the policy) to the existing policy rather than disclosure on a proposal form for the renewal. The reason for this, as described in the preceding paragraph, was explained to SWM. Despite this, SWM did not make a disclosure of a claim circumstance under the existing policy on the basis they did not believe any of the UCIS business (which included Matrix) would give rise to a claim and they felt that doing so would simply increase the premium unnecessarily.

74. Upon renewal the PII policy for 2013/14 explicitly excluded cover for claims in respect of Matrix (and other specified UCIS investments). It followed that from that point SWM was uninsured in respect of Matrix (and the other specified UCIS investments) because it was excluded under the new policy and SWN had not notified a claim circumstance in respect of Matrix under the existing policy.

75. SWM's PII policy fell due for renewal again on 15th October 2014 and discussions took place with EIB in September 2014. By then, SWM knew the Commission was concerned about advice given in respect of PATF and indeed on 10th September 2014 the Commission served a notice on SWM requiring it to appoint Deloitte as an independent reporting professional to investigate the advice given by SWM in respect of PATF and Matrix (this was subsequently changed to Grant Thornton). Although SWM notified its insurers under the then current policy (2013/14) of the investigation (so that it was covered under the existing policy in respect of the costs of the investigation etc. under section 2.5 of the policy), it did not notify insurers under the current policy of any circumstances which might give rise to a claim in respect of PATF. On renewal, the policy excluded claims in respect of all UCIS business (which included PATF). It follows that, from that point at the latest, SWM was uninsured in respect of claims concerning PATF.

76. We say 'at the latest' because it transpired later (in October 2015) that the insurers considered PATF should have been included as a UCIS on the renewal form completed by SWM for the 2013/14 policy. As a result SWM acknowledged on 9th November 2015 that claims in respect of PATF were excluded and would not be met under the 2013/14 policy as well as being specifically excluded under the 2014/15 policy and thereafter.

77. In summary therefore, SWM has been uninsured for claims in respect of Matrix and PATF from October 2013 onwards. As set out in Section 8.1 of the MTL, the IB Code contains a number of provisions requiring a registered person to maintain 'adequate insurance' including PII cover. A registered person must also have adequate procedures to ensure compliance with the terms and conditions of its PII policy, particularly in relation to the timely notification of events which may lead to a claim on the policy by the registered person. Finally, the IP Code states that the Commission must be notified of any material limitations in a registered person's PII policy.

78. SWM was aware in September 2013 that insurers were excluding cover of Matrix on its 2013/14 policy but it did not notify the Commission until 25th April 2014, a delay of some 7 months. It knew from November 2014 that claims in respect of PATF were unlikely to be covered under the 2014/15 policy but did not notify the Commission until October 2015, a delay of some 11 months. Having discovered in November 2015 that claims in respect of PATF were also likely to be excluded under the 2013/14 policy, SWM did not notify the Commission of this fact until 10th April 2017, a delay of some 17 months. Finally, in respect of CGLN, this was excluded from the 2016/17 policy but SWM had disclosed a claim circumstance in respect of CGLN under the 2015/16 policy so that claims will be covered. Nevertheless, having learned of the exclusion in October 2016, SWM did not inform the Commission until February 2017, a delay of some 5 months.

79. The SWM affidavit disputes the finding by the Board that SWM failed to maintain adequate PII cover. It asserts that what happened is an inevitable consequence of PII policies which are written on a 'claims made' basis as described above. It accepts that SWM is uninsured in respect of claims relating to Matrix and PATF but says that this arises naturally as a result of the nature of PII policies. If an insurer excludes claims in respect of a particular investment product, there is thereafter no insurance for claims relating to that product even if the insurance policy in force at the time the advice to invest was given covered claims relating to the product.

80. In his submissions, Advocate Blakeley attacked the Board's finding on the basis that there was no definition in the IB Code as to what constituted 'adequate' insurance. How was a registered person supposed to know what amounted to 'adequate' insurance?

81. In our judgment, the Board's finding that SWM failed to maintain adequate insurance is unassailable. Advocate Benest accepted that, if an insurer upon renewal excludes claims in respect of a particular investment product where there are no circumstances which ought to have been disclosed under the previous policy, there would of course not have been any 'failure' on the part of the registered person. As SWM said in its affidavit, this situation would arise out of the very nature of PII policies written on a claims made basis.

82. But that is not the position here. The only reason that claims in respect of PATF and Matrix are uninsured is because SWM failed to notify circumstances which might give rise to a claim under the then current policy at the time when it clearly should have done. If it had done as advised by EIB, claims in respect of Matrix and PATF would be covered by the policy in force at the time notification of the circumstances was given.

83. As to the point concerning the lack of a definition of 'adequate' insurance, this appears to us to be a submission of last resort. It is perfectly obvious that where there is no insurance in respect of investment products in which 42 of SWM's clients have been invested, the insurance of SWM is not adequate.

84. A further point made by SWM is that it was unreasonable for the Board to find that SWM did not 'understand its obligations' in respect of making notifications to its insurers. It submits that it did understand its obligations but simply made an error of judgment in not making notification to the insurers in connection with Matrix and PATF. We reject this submission. If a person commits a fundamental error in relation to the obligation to notify, it is perfectly reasonable to find that the person does not understand the obligation. In this case, particularly in relation to Matrix, the error on the part of SWM was of the most elementary kind. Matrix had suspended its redemptions and SWM had received a complaint from Mr Perchard about its advice in relation to Matrix. It was advised by EIB that it ought to notify the insurer of circumstances which might give rise to a claim and the consequences of not doing so were pointed out to it. Yet, despite this, it refused to make a notification of possible claim circumstances. That was such an elementary error in the teeth of advice that the Board was perfectly entitled to conclude that SWM did not understand its obligation.

85. Finally, in relation to notification to the Commission, the SWM affidavit objects to the Board's finding on the basis that the IB Code at the time did not impose any time limit upon making notifications to the Commission. We regard this as a hopeless point. It is perfectly obvious that, having regard to the underlying purpose of requiring notification, the obligation on a registered person must be to notify the Commission reasonably promptly.

86. In this respect it is to be noted that the assertion in the SWM affidavit is at odds with the annual registration fee form for 2014 submitted by SWM in which, in relation to notification to the Commission, SWM acknowledged that immediate action to notify the Commission of any exclusions should have been taken at the time of the renewal of the PII insurance.

87. The final submission was that the delay in notification to the Commission did not justify the Board's finding that SWM did not understand its obligations in this respect. We reject this submission. SWM was guilty of repeated delay as described above and clearly did not understand its obligation

to notify the Commission reasonably promptly. Indeed the fact that it did not understand this obligation is confirmed by the SWM affidavit which protests that SWM did nothing wrong as there was no stipulated time limit.

88. In all the circumstances, we uphold the Commission's finding under sub-paragraph (b) in respect of insurance.

5. Disclosure

89. SWM submits the Commission followed an unfair procedure in that it failed to disclose certain documents to SWM. The submission relates to three categories of document:-

(i) A report from Deloitte in relation to another investigation

(ii) The Executive's file in relation to the Perchard complaint

(iii) Correspondence with clients of SWM.

90. As to (i), Deloitte were apparently instructed in relation to an investigation into another investment adviser who had also advised clients to invest in PATF. SWM believes that the report from Deloitte confirms SWM's view that PATF should be regarded as a low risk investment. However, given that, unlike the Executive, the Board has made no finding of mis-selling or of the risk rating of any of the Products, that issue is no longer relevant. Accordingly Advocate Blakeley very properly did not proceed with the point.

91. As to (ii), we have dealt with this at paras 58 to 61 above.

92. We turn therefore to (iii). During the course of the Commission's investigation, SWM on a number of occasions requested disclosure of communications to the Commission from any of SWM's clients who had invested in the Products. This request was refused.

93. Through other sources, SWM has obtained a copy of an email dated 2nd August 2018 from a Mr and Mrs Carroll, who were clients of SWM who had invested in PATF. The email was in response to a letter from the Executive to a number of clients whose files had been selected for examination by Duff and Phelps for the purposes of the DP report. The email response from Mr and Mrs Carroll

was to the effect that they had been given good advice by Mr Le Fondré of SWM, who had explained the risks involved both orally and subsequently in writing. They were going to continue to use Mr Le Fondré as their investment adviser and did not wish to get involved in the proposed review. This letter was supplied to Duff and Phelps but was not provided to SWM nor was it included in the papers provided by the Executive to the Board.

94. The general civil rules concerning discovery do not apply in administrative appeals (see for example W –v- JFSC [2015] JRC 017 upheld in the Court of Appeal at [2015] JCA 060); and a fortiori do not apply in connection with administrative decisions themselves. However, the Commission, like other decision-makers, is under a duty to act fairly – see Interface Management Limited –v- JFSC [2003] JLR 524 at para 11. In connection with disclosure, this Court has acknowledged the importance of maintaining confidentiality as reflected in Article 37 of the Law. But this has to be balanced against the need for fairness towards those being investigated. Thus in Francis at para 285 the Court said:-

> ***"We respectfully agree with the above views and we accept that there is a strong public interest in preserving the confidentiality of information supplied to the Commission and the preservation of such confidentiality is a matter for the Commission properly to take into account when deciding whether it should disclose information which has been provided to it. We accept that it would have been open to the Commission to have supplied the whole of the transcripts of the interviews to the appellant because such disclosure would have been for the purposes of assisting the Commission to discharge its functions. However, in our judgment, the Commission is entitled to hold a balance between the public interest in encouraging full disclosure by and the cooperation of those being interviewed (by respecting the confidentiality of what they say) and the need to act fairly towards another person who is subject to regulatory action where reliance may be placed in part on what is said in interview by others. In our judgment, the Commission acted in a proportionate and reasonable manner on this occasion by ensuring that the gist of what was said against the appellant by the others was put to him without disclosing the full transcript of the interviews (which would no doubt include much other material which was not relevant to the appellant)."***

95. Article 32 would certainly not prevent the Commission from disclosing to an investment adviser under investigation communications received from its clients. Although such communications would fall within Article 32, the Commission would be able to take advantage of the gateway at Article 38(1)(b)(i) which permits disclosure by the Commission where such disclosure is done for the purpose of assisting the Commission to discharge its functions.

96. In our judgment, the email from Mr and Mrs Carroll should have been disclosed to SWM and to the Board. The stance of the Executive was that SWM had been guilty of mis-selling by giving unsuitable advice to its clients. It seems to us that evidence from a client who considered he had received perfectly proper and satisfactory advice may – we emphasise may – be relevant to the issue of whether there had in fact been mis-selling. SWM would no doubt have been able to pray the letter in aid of their submission that there had been no mis-selling and it would have been relevant for the Board to have considered the email along with the evidence relied upon by the Executive in support of the suggestion that there had been mis-selling. The weight to be attached to such a communication would of course be a matter for the Board but we do not see that it can be dismissed as irrelevant.

97. In our judgment, the Executive's duty of fairness may include, where appropriate, disclosing evidence which might be said to undermine its case or to support that of the entity being investigated. Disclosure will of course have to be balanced against the need for confidentiality but it is hard to see why that would be relevant in the present case where the communication was entirely supportive of SWM. The position would of course be different in the case of a whistle-blower where the need for confidentiality might well outweigh the need for disclosure, with the duty of fairness being satisfied by communicating the gist of the complaint against the entity under investigation.

98. However, the decision of the Board does not involve a finding of mis-selling. It is entirely directed towards the absence of appropriate due diligence documentation and on that it is hard to see how the subjective opinion of one client that he received satisfactory advice would be material. Accordingly we do not think the failure to disclose the letter from Mr and Mrs Carroll has led to unfairness in that respect.

99. However, it might have been relevant to the question of sanction. Let us assume, by way of an extreme example, that all 42 clients had written to the Commission to say they were entirely satisfied with the advice and thought that SWM were excellent investment advisers. We are not to be taken as saying that would determine the outcome or lead necessarily to a decision not to revoke registration; but such communications would surely be relevant to the Board's decision as to whether revocation was a proportionate sanction. Whilst the view of only one client would of course carry much less weight, we nevertheless consider fairness suggests that it is something of which the Board should have been aware when reaching its decision and it is something which should have been disclosed to SWM so that they could make such use of it as they saw fit when arguing against the proportionality of revocation as a sanction.

6. Sanction

100. The Board set out its four key reasons for concluding that revocation of registration was the appropriate sanction at para 4.3 of the Notice as set out at para 29 above.

101. We propose to consider first the fourth reason given at 4.3.4, namely the Board's view that the IB Code breaches are ongoing and that SWM therefore continues to pose a risk to the best interests of Jersey retail financial service clients. We shall consider this point first in connection with the due diligence documentation finding set out at sub-paragraph (a) at para 4.2.1 of the Notice.

102. We begin by accepting the Board's view of the importance of due diligence documentation. At times, SWM appears to have downplayed the importance of documentation as opposed to whether due diligence was in fact carried out but we think the summary contained at paragraph 9 of Lord Eatwell's second affidavit discloses an entirely reasonable approach on the part of the Commission:-

> ***"I note that [the SWM affidavit] seeks to draw a distinction between a failure to follow due diligence procedure at all, and a failure to document such steps. The Board agrees that there is such a distinction, and that the primary criticism of SWM is that it failed to produce and keep proper records of its due diligence over products and clients. However, it is in the Board's view a centrally important part of proper due diligence that written records be created to document the steps taken. This is extremely important in order to provide for the protection of both the service provider and the client, but also the Island's reputation as a well-regulated financial services jurisdiction. Without records it is impossible for a supervisory body such as the Commission to scrutinise the conduct and procedures of service providers, and ultimately to ensure the proper running of financial services businesses. To fail to keep such records is accordingly to fail to properly carry out due diligence itself, because the former is a core and extremely important part of the latter, as well as being a requirement under the relevant IB Code of Practice."***

103. It is not surprising therefore that during the course of the stage 4 meeting, Lord Eatwell said that "*the issue of due diligence was the core failing within SWM which occupied our attention and raised considerable concerns with us.*"

104. The question in relation to sanction, is whether, as the Board found, SWM had refused to take any steps to remedy the failings in respect of due diligence documentation. In that respect, we were referred by Advocate Blakeley to the PEMS response (referred to at para 22 above) which was prepared by SWM as its response to the On-Site Report of 12th January 2016. The PEMS response was provided to the Commission on 12th February 2016. We were taken through that document in

some detail. Suffice it to say that it responds to the points made in the On-Site Report and appears to address them. Thus it refers to updated policies and procedures relating to new products, a new Suitability Letter template, a new document dealing with product and due diligence, a new procedures manual, a new compliance monitoring plan and other documents. Copies of these appear to have been supplied to the Executive. We were not referred to anything in the papers before us which suggested that the Executive remains dissatisfied with the new due diligence documentation prepared by SWM.

105. We noted that the Board had, at the Stage 3 meeting, requested a summary from the Executive of any outstanding issues in relation to the On-Site Report. During the course of the hearing, we were provided with the Executive's response to that request. The response said there were fundamental disagreements between the Executive and SWM on certain matters, but these appear to us to relate to whether there had been mis-selling of the CGLN and whether the £200 payment from Cherry Godfrey was or was not a commission. These were past matters and do not seem to relate to the question of the due diligence documentation.

106. There is no reference in the MTL or the Notice to the PEMS response and to whether there are still continuing deficiencies in SWM's due diligence documentation.

107. In those circumstances, we cannot agree that the finding of the Board that SWM has refused to take steps to remedy any of the significant failings in respect of due diligence documentation is a reasonable one. On such evidence as is available to us (and was available to the Board), SWM appears to have taken considerable steps to remedy the deficiencies in the due diligence documentation and there is nothing in the material before us to show that the due diligence documentation is still considered to be inadequate or deficient.

108. Given Lord Eatwell's view (with which we agree) that the due diligence documentation failure was a core element of the Board's decision, we consider that this alone is sufficient to quash the revocation on the basis that the Board appears (on the material available) to have proceeded on a mistaken view of whether the failure of due diligence documentation is continuing.

109. In relation to whether there is a continuing risk in relation to the other matters listed in paragraph 4.2.1 of the Notice, our conclusions are as follows:-

    (i) As to sub-paragraph (b) concerning insurance, we acknowledge that technically the failure to have adequate insurance in respect of Matrix and PATF is continuing. But there is nothing further that can be done about that and it arises out of past actions by SWM. SWM behaved

appropriately in disclosing CGLN as a possible claim circumstance with the result it is insured in relation to CGLN. It appears therefore to have learned from the failure to disclose a claim circumstance in respect of Matrix and PATF. Whilst the approach of SWM in its affidavit has not helped SWM's cause in this respect, we find that SWM is bound to have learned from experience and we do not consider that there is an ongoing risk of SWM not having adequate insurance because of a failure to disclose in relation to other matters.

(ii) As to sub-paragraph (c) concerning complaints, we agree that SWM's obduracy in not re-opening the Perchard complaint means this is continuing. However, SWM's belated acceptance that it is wrong to use words which lead a client to conclude he is being threatened with the need to move investment adviser if he pursues his complaint means that such conduct it is unlikely to occur again.

(iii) As to sub-paragraph (d), we do not consider that the fact that SWM is still of the opinion that the payment from Cherry Godfrey was not 'commission' means that it is likely to repeat the conduct. SWM is now aware that the Commission's view is different and there seems to us to be no real reason to believe SWM will ignore the view of the Commission as to what constitutes commission in future.

110. Given our view on these matters, we propose to deal only briefly with certain other submissions made on behalf of SWM in relation to the proportionality of the sanction of revocation.

111. In relation to para 4.3.1 of the Notice, Advocate Blakeley submitted that the wording exaggerated the period of breach. It implied the breach had continued throughout the period from 2004 to 2015 whereas in fact the sales of Matrix and PATF had occurred between 2004 and 2009 and those of CGLN in 2014 and 2015. We do not think there is anything in this point. Para 3.2 of the MTL sets out the periods over which each individual Product was sold and the Board would have been fully aware of that. The use of a shorthand expression to cover the entire period cannot possibly cast any doubt on the Board's decision.

112. As to para 4.3.2 of the Notice, Advocate Blakeley submitted that the Board had misunderstood his submission at the Stage 4 meeting of the Board as summarised at para 2.6.1 of the MTL. We have read the transcript carefully and we agree that, when read fairly and in context, Advocate Blakeley was not saying anything different at the meeting from that which is said by Lord Eatwell at paras 13 and 14 of his second affidavit, even if Advocate Blakeley might have put it slightly more clearly. The position appears in fact to be agreed by everyone, namely that the risk rating of a fund is clearly an important matter when considering its suitability for any particular client. However it is merely one factor. Other factors in relation to the client have to be considered including the client's attitude

to investment risk, capacity for losses, investment and financial experience and sophistication and the proportion of monies to be invested in the fund. In the circumstances we do not consider it reasonable for the Board to have taken Advocate Blakeley's oral comments in the course of the Stage 4 hearing as a factor pointing in favour of revocation rather than some lesser sanction.

113. In relation to para 4.3.3 of the Notice, Advocate Blakeley submitted that the fact that losses had been suffered by some of the clients was not relevant. As a matter of detail, he pointed out that there were no losses in relation to CGLN and that in relation to PATF, some clients had made profits but others had made losses. His main point was that, given there was no finding by the Board of mis-selling, the fact that losses had been suffered by some clients was not a relevant factor. The criticism of the Board related to the absence of due diligent documentation, not to the quality of the advice which SWM had offered its clients.

114. We do not think it was unreasonable for the Board to consider the existence of losses as a factor. It is part of the overall circumstances of the case. Furthermore, as Advocate Benest submitted, the lack of proper due diligence documentation increases the likelihood of something going wrong and a loss being suffered as a result. It was therefore a factor properly to be taken into consideration.

115. Advocate Blakeley further submitted that the Board had given insufficient reasons in connection with its choice of sanction. Thus, neither the MTL nor the Notice discussed lesser sanctions or gave reasons as to why they were not appropriate and that revocation was the necessary sanction. We do not agree that it was necessary for the reasoning of the Board to descend to this level of detail. As the Court said in Anchor at para 113, the Board is not sitting as a judge to give a reasoned judgment. The key test is whether sufficient reasons have been given so that the person concerned knows why the decision has been given against him and whether he has grounds of appeal. In relation to the level of reasoning generally, the MTL, which was incorporated in the Notice, is a very detailed document which sets out exactly what facts are found by the Board, the IB Codes which are breached and the view which the Board takes of the various breaches. In connection with the particular point concerning alternative sanctions, it is sufficient for the Board to have explained why it considers revocation to be necessary and it has done this at para 4.3 of the Notice. There was no duty upon it to outline the possible lesser sanctions and explain why it was rejecting those as a suitable course of action.

116. Finally, Advocate Blakeley submitted that, although the Board's decision purported to be based simply upon the failure of due diligence documentation rather than mis-selling, there was a risk nevertheless of the Board being influenced by the clear view of the Executive that there had been mis-selling and wrongly taking this into account when deciding on the appropriate sanction. In support of this proposition, he referred to the fact that para 8.3 of the draft public statement (which

accompanied the Notice) concluded that there was a significant danger that unsuitable advice was likely to be '*repeated*' if SWM remained registered. Given there had been no finding of unsuitable advice, this was clearly an erroneous statement. Advocate Benest accepted in his submissions that this was so and made clear there would have to be appropriate review and editing of the public statement before it was issued. We do not consider that this mistaken use of the word '*repeated*', casts any doubt on the matters set out in the Notice and the MTL, which make it clear that the Board's decision is based on the absence of due diligence documentation and not on mis-selling.

Conclusion

117. For the reasons we have given, we conclude that the findings at sub-paragraphs (a), (b) and (c) of para 4.2.1 of the Notice are reasonable and should therefore be upheld. However, sub-paragraph (d) is unreasonable in concluding that a lack of integrity is shown.

118. Nevertheless, the Board's decision to revoke SWM's registration is quashed because:-

(i) as set out at paras 107 and 109 above, its conclusion at para 4.3 concerning the lack of steps to remedy failings and/or the risk of repetition is unreasonable in relation to the due diligence documentation, insurance, the Smith complaint and the payment of commission;

(ii) as set out at para 112 above, its finding at para 4.3.2 was unreasonable;

(iii) as set out at para 55 above, there is no longer a finding of lack of integrity under sub-paragraph (d) of para 4.2.1 of the Notice in relation to the alleged commission payments; thus, the only lack of integrity now relates to how SWM dealt with the Smith and Perchard complaints; and

(iv) as set out at para 99 above, the letter of support from Mr and Mrs Carroll should have been placed before the Board.

119. As the Court made clear at para 346 of the judgment in Francis, the decision on matters such as the appropriate sanction is primarily a matter for the Commission as regulator of the financial services industry. Accordingly we remit the matter of sanction to the Board to reconsider in the light of the findings contained in this judgment and any material which may be put before the Board at that stage.

Extraneous matters

120. It is clear from the material before us that there is an antagonistic relationship between SWM and the Executive. This has resulted in SWM making a complaint against certain members of the Executive. That complaint has been upheld in certain respects but dismissed in others.

121. The complaint and the findings of the Board in respect of the complaint were in the papers before us and we have read them as requested by Advocate Blakeley. However, we do not consider that the matters raised therein have assisted us. The decision in this case was taken by the Board (not the Executive) following the Stage 4 hearing and that decision is contained in the MTL and the Notice. Nothing in the material before us suggests that the matters raised in the complaint have any bearing on the reasonableness of the Board's decision and we urge SWM to adopt a somewhat less adversarial approach as this matter goes forward and the Board considers what is the appropriate sanction in the light of this judgment.